COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

SARAH MCLOUGHLIN, A MINOR, BY JOHN AND TABETHA MCLOUGHLIN HER PARENTS AND NEXT FRIEND	**:**	**CASE NO. 2013 CVH 00050**
Plaintiff	**:**	**Judge McBride**
vs.	**:**	
CHERYL A. WILLIAMS, et al.	**:**	**DECISION/ENTRY**
Defendants	**:**	

Becker & Cade, Dennis A. Becker, counsel for the plaintiffs, 526 A Wards Corner Road, Loveland, Ohio 45140.

Freund, Freeze & Arnold, Timothy B. Schenkel, counsel for defendant Cheryl A. Williams, Fourth and Walnut Centre, 105 E. Fourth Street, Suite 1400, Cincinnati, Ohio 45202.

Kari Cox, defendant, 5652 Viewpoint, Apt. A, Cincinnati, Ohio 45213.

This cause is before the court for consideration of a motion for summary judgment filed by defendant Cheryl A. Williams.

The parties agreed to submit the motion without oral argument and the court took the motion under advisement on April 18, 2014.

Upon consideration of the motion, the record of the proceeding, the evidence submitted for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

On November 6, 2009, Tabetha McLoughlin was asked by her nine year old daughter Sarah McLoughlin for permission to have a sleepover with her friend Mariah Anderson.[1] Sarah was generally not allowed to spend the night at Mariah's home because of Tabetha's concerns about Mariah's mother Kari Cox.[2] In this instance, however, Sarah explained that the sleepover was to occur at the home of Cox's mother Cheryl Williams.[3] At that point, Tabetha granted Sarah permission to sleep at Williams' home for the evening.[4] Kari Cox called Williams to ask if she and the children could spend the night and Williams agreed.[5]

Cheryl Williams then picked up Sarah McLoughlin, Kari Cox, Mariah Anderson, and Cox's two sons from Tabetha McLoughlin's home.[6] Tabetha had a brief conversation with Williams confirming that Williams would be there for the sleepover and that they were going to be at Williams's home.[7] Tabetha assumed that Williams

[1] Deposition of Tabetha McLoughlin at pgs. 56 and 61 and Deposition of Sarah Jean McLoughlin at pg. 8.
[2] Id. at pg. 60.
[3] Id. at pg. 61.
[4] Id.
[5] Id. at pg. 12.
[6] Id. at pg. 57.
[7] Id. at pg. 70.

would be keeping an eye out for Sarah but she did not ask Williams if she would, in fact, be doing so.[8]

The next morning, the girls dressed themselves and went outside to play with another neighborhood girl.[9] Jeff Brandenburg, Williams' roommate, was outside at the time with the girls.[10] Williams stayed inside with Cox's youngest son and Cox went back and forth between inside and outside the house.[11]

Brandenburg had recently acquired an ATV which Mariah had ridden the previous evening.[12] That morning, Mariah asked if she and Sarah could ride on the ATV and Brandenburg granted them permission.[13] Sarah recalls Williams being present for the conversation but that she did not say anything.[14]

Mariah and Sarah got on the ATV, rode away from Williams's home, and, at a certain point, the ATV flipped, causing injuries to Sarah, including to her knee.[15] The accident did not take place on property belonging to Williams.[16]

The defendant Cheryl Williams now moves the court for summary judgment on the negligence claim brought against her in this case.

STANDARD OF REVIEW

[8] Id.
[9] Deposition of Cheryl A. Williams at pg. 17.
[10] Id.
[11] Id. at pg. 18.
[12] Id. at pgs. 11 and 14.
[13] Sarah Jean McLoughlin Depo. at pg. 38.
[14] Id.
[15] Id. at pg. 43-44.
[16] Tabetha McLoughlin Depo. at pg. 69.

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[17]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[18] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[19]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[20]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[21] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–

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[17] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

[18] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[19] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

[20] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

[21] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[22]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[23] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[24]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[25] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[26] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[27]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[28] However, if the moving party satisfies this burden, then the

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[22] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[23] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[24] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[25] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[26] Id.
[27] Id.
[28] Id.

nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[29] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[30] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[31]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[32] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[33]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[34]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E),

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[29] Id.
[30] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[31] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[32] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[33] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[34] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.

which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[35]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[36] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[37] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[38]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment

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[35] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[36] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[37] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[38] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[39]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[40]

LEGAL ANALYSIS

"In order to establish actionable negligence, a plaintiff must identify that the defendant owed her a duty, that a breach of that duty proximately caused the injury, and that plaintiff was injured."[41] "Although the scope and extent of the duty is ultimately a question of fact, the existence of such a duty is, in the first instance, a question of law for the court."[42]

The accident at issue did not occur on Williams's property. "A host who invites a social guest to [her] premises owes the guest they duty (1) to exercise ordinary care not to cause injury to his guest by any act of the host or by any activities carried on by the host while the guest is on the premises, and (2) to warn the guest of any condition of the premises which is known to the host and which one of ordinary prudence and foresight

[39] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[40] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[41] *Hite v. Brown*, 100 Ohio App.3d 606, 611, 654 N.E.2d 452 (8th Dist.1995), citing *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614, 616 (1989); and *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).
[42] Id., citing *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 269–270 (1989).

in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous condition.' "[43] In this case, there was no act by Williams, no activity hosted by Williams on the premises, and no dangerous condition on the premises which would give rise to liability on her part.

Moreover, while the court does not believe "any activities carried out by the host while the guest is on the premises" would apply in the case at bar, as Cheryl Williams was not carrying out the activities with the ATV and the injury did not occur on the premises, the court would note that, to the extent that said provision would apply, the doctrine of primary assumption of the risk, which is set forth as an affirmative defense in the defendant's answer, would negate any duty owed by Williams. " 'Primary assumption of the risk relieves a recreation provider from any duty to eliminate the risks that are inherent in the activity * * * because such risks cannot be eliminated.' "[44] "[O]nly those risks directly associated with the activity in question are within the scope of primary assumption of risk * * * [;]"[45] and "[t]he types of risks associated with [an] activity are those that are foreseeable and customary risks of the * * * recreational activity."[46] Crashing an ATV is clearly a foreseeable and customary risk associated with riding such a vehicle, and the doctrine of primary assumption of the risk applies to minors.[47]

As such, there is no premises liability in the case at bar and, in fact, it does not appear that the plaintiffs are making any such claim. Instead, the plaintiffs argue that

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[43] *Brennan v. Schappacher*, 12th Dist. Butler No. CA2008-09-231, 2009-Ohio-927, ¶ 11, quoting *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951), paragraph three of the syllabus.
[44] Id. at ¶ 13, quoting *Whisman v. Gator Invest. Properties, Inc.*, 149 Ohio App.3d 225, 236, 776 N.E.2d 1126 (1st Dist.2002).
[45] Id. at ¶ 17, quoting *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 432, 659 N.E.2d 1232 (1996).
[46] Id. at ¶ 18, quoting *Pope v. Willey*, 12th Dist. Clermont No. CA2004-10-077, 2005-Ohio-4744, ¶ 11.
[47] See, e.g., *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699.

the negligence claim against Cheryl Williams is based on the doctrine of *in loco parentis*.

" 'The term 'in loco parentis' means 'charged, factitiously, with a parent's rights, duties, and responsibilities.' * * * A person in loco parentis has assumed the same duties as a guardian or custodian, only not through a legal proceeding.' "[48] " 'The key factors of an in loco parentis relationship have been delineated as 'the intentional assumption of obligations incidental to the parental relationship, especially support and maintenance.' "[49]

" '[O]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.' "[50] This " 'recognizes that one who voluntarily takes custody of another is under a duty to protect the other against unreasonable risks of harm.' "[51] " 'As it involves the ultimate physical and legal control of another, a custodial relationship is not entered into lightly. One who accepts custody of a child must voluntarily assume the duties and responsibilities of a parent towards that child.' "[52]

In the case at bar, Cheryl Williams did not assume the duties and responsibilities of a parent, guardian or custodian toward Sarah McLoughlin. Williams gave her daughter Kari Cox permission to come over and bring her children and Sarah for a

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[48] *Evans v. Ohio State University*, 112 Ohio App.3d 724, 680 N.E.2d 161 (10th Dist.1996), quoting *State v. Noggle*, 67 Ohio St.3d 31, 33, 615 N.E.2d 1040 (1993). See, also, *Glancy v. Spradley*, 12th Dist. Butler No. CA2012-02-024, 2012-Ohio-4224, ¶ 7.

[49] *State v. Hoffman*, 3rd Dist. Seneca No. 13-12-54, 2013-Ohio-4111, ¶ 36, quoting *Evans*, supra, 112 Ohio App.3d at 736, quoting *Nova Univ., Inc. v. Wagner*, 491 So.2d 116, fn. 2 (Fla.1986).

[50] *State v. Funk*, 10th Dist. Franklin No. 05AP-230, 2006-Ohio-2068, ¶ 65, quoting 12 Restatement of the Law 2d, Torts (1965), 118, Section 314A(4).

[51] Id. at ¶ 66, quoting *Slagle v. White Castle Systems, Inc.*, 79 Ohio App.3d 210, 217, 607 N.E.2d 45 (10th Dist.1992), jurisdictional motion overruled by (1992), 65 Ohio St.3d 1420, 598 N.E.2d 1170.

[52] Id., quoting *Slagle* at 217.

sleepover. Williams spoke briefly with Tabetha McLoughlin confirming that the children were going to be staying the night at her home and that she would be there. However, this brief exchange does not establish that Williams assumed parental obligations for Sarah McLoughlin. While Tabetha McLoughlin made the assumption that Williams was going to be keeping an eye out for Sarah, this assumption, not based on any confirmation from Williams herself, does not give rise to a legal duty on Williams' part. The definitions and discussions of the term *in loco parentis* cited above indicate that more is required to create an *in loco parentis* relationship than simply agreeing to have a child spend the night in your home on one occasion.

The plaintiffs also discuss foreseeability of an injury with regard to the existence of a duty in a negligence action. However, as also pointed out by the plaintiffs, "there is no duty to act affirmatively for another's aid or protection absent some 'special relation' which justifies the imposition of a duty."[53] There is no *in loco parentis* relationship in the case at bar and foreseeability of any injury did not create, in and of itself, a duty to act affirmatively for Sarah's protection.

As there was no duty in the case at bar, there can be no negligence claim against Cheryl Williams. There is no genuine issue of material fact remaining to be litigated and Williams is entitled to judgment as a matter of law.

CONCLUSION

[53] *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 293, 673 N.E.2d 1311 (1997), citing, *Littleton v. Good Samaritan Hosp. & Health Center*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449.

The motion for summary judgment filed by the defendant Cheryl A. Williams is well-taken and is hereby granted as to any and all claims against her in the present action.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 5th day of June 2014 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride